IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)
)
vs.) Case No. CR-00-S-422-S
)
ERIC ROBERT RUDOLPH,)
)
Defendant.)

ORDER REGARDING CONFERENCE TRANSCRIPTS

In order to ensure a proper balance between the First Amendment right of press and public access to criminal proceedings and the parties' Fifth and Sixth Amendment rights to a fair trial, it has become necessary for the court to consider, *sua sponte*, a procedure for the handling of transcripts of status conferences[1] conducted by the court in this case. The court believes the proper balance is struck by temporarily sealing transcripts of conferences to give the parties an opportunity to determine whether to seek to extend the seal, after which, however, the seal is lifted and the transcripts are made public.

As background, the court recites a brief history of this case before addressing the rationale for this procedure. The defendant, Eric Robert Rudolph, is charged in this case with the bombing of an abortion clinic, in which one person was killed and another severely injured. He also is charged in a separate case in Atlanta with bombings in that city, including one at the Centennial Olympic Park that resulted in a death. These cases have drawn a significant amount of media and

[1] To be clear, this Order does not control the filing or handling of transcripts of *ex parte* conferences.

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public attention. Most pertinent to this matter, however, is the complexity and size of the cases, and the problems those factors have caused in the parties' preparation for trial. For example, the court has noted previously that the Government has reported that the Birmingham investigation alone entails some 100,000 documents, with the Atlanta investigations having an additional 600,000 documents. The sheer task of determining which of these documents should be made available to the defense as discovery and then providing those documents in a format that gives the defense a meaningful opportunity to review them has proved to be a daunting job for the parties and the court. To attempt to ease this process, the court conducted status conferences with counsel for the parties on July 1, July 30, and September 3, 2003, and it is anticipated that several more status conferences will be scheduled. Although conducted informally, the conferences have been recorded. The conferences are intended to be frank and candid discussions of the problems encountered in exchanging discovery, including the necessity for protective orders to preserve the confidentiality of witness identities. The Government has expressed a genuine concern about its obligation to protect witnesses from threats and harassment under the Victim and Witness Protection Act, Pub.L. 97-291. Discussions at the conferences have often centered on how the Government is to disclose to the defense the identities of more than 700 potential witnesses while maintaining its obligation to protect them under the Act. The frank and open nature of the discussions at the conferences has proven fruitful in smoothing discovery snags and reaching accommodations between the parties on potentially contentious problems.

At the same time, the court is mindful of the important role the press plays in assuring the integrity and legitimacy of the criminal justice system by making it open for all to see. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed. 2d 248 (1982); United

States v. Valenti, 987 F.2d 708 (11th Cir. 1993). The First Amendment vests the press and the public with a constitutional right of access to criminal trial proceedings. That right, however, is not absolute. Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 8-9, 106 S.Ct. 2735, 2740, 92 L.Ed.2d 1 (1986). One of the factors relevant to the balancing process is whether the particular proceeding at issue historically has been open to the press and public, or is one traditionally not open. On this point, the court of appeals has written:

> [W]e do not interpret Press-Enterprise I to require a trial court to articulate findings that a closed bench conference is necessary and narrowly tailored to preserve higher values before a closed bench conference occurs. Instead, Press-Enterprise notes that a court may conduct an *in camera* conference on the record where the "constitutional value sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time." Press-Enterprise I, 464 U.S. at 512, 104 S.Ct. at 825. In this process, the trial court balances the right of access against the interest in maintaining a sealed transcript. Press-Enterprise I, 464 U.S. at 512, 104 S.Ct. at 825. In placing a duty on the trial court to balance competing interests and make findings after the occurrence of a closed bench conference, the Court in Press-Enterprise I articulated a workable procedure to accommodate the public's right of access and the long recognized authority of a trial court to conduct bench conferences outside of public hearing. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 n. 25, 102 S.Ct. 2613, 2620 n. 25, 73 L.Ed.2d 248 (1982) (holding that a trial court has traditional authority to conduct *in camera* conferences); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n. 23, 100 S.Ct. 2814, 2839 n. 23, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring) (stating that "the presumption of public trials is, of course, not at all incompatible with reasonable restrictions imposed upon courtroom behavior in the interest of decorum," including the exclusion of the public and the press from conferences at the bench and in chambers where such conferences are distinct from trial proceedings); United States v. Gurney, 558 F.2d 1202, 1210 (5th Cir. 1977) (holding that "bench conferences between judge and counsel outside of public hearing are an established practice, ... and protection of their privacy is generally within the court's discretion.... Such conferences are an integral part of the internal management of a trial, and screening them from access by the press is well within a trial judge's broad discretion"), cert. denied, Miami Herald Publishing Co. v. Krentzman, 714 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978), overruled in part on other grounds, Nixon v. Warner Communications, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978).

United States v. Valenti, 987 F.2d 708, 713-14 (11th Cir. 1993). The court of appeals concluded that closed bench conferences could comply adequately with any right of access by making transcripts of the conferences public after "the danger of prejudice has passed." Id.

In the instant case, the status conferences conducted by the court are designed to preserve the defendant's right to a fair trial by assuring him of the fullest degree of discovery possible under the law, while maintaining the legitimate confidentiality of the identity of potential witnesses from widespread publication. Both the Government and the defendant have an interest in assuring that potential witnesses are not exposed to the inconvenience and distraction that media attention focused on them might bring. The fairness of the trial turns to some extent on the credibility of the testimony of witnesses untainted by the rigors of media attention. Additionally, status conferences historically have not been open to the press and public, but have been private discussions between the court and parties on matters not directly related to the resolution of the merits of the case. No motions or substantive disputes are discussed or resolved, but procedural and logistical matters are addressed. All of this leads the court to believe that making the transcripts of the conferences available after the conferences have occurred is a fair and adequate accommodation of the press's important right of access.

It is, therefore, ORDERED as follows:

1. Transcripts of status conferences conducted by the court shall be immediately docketed under seal for a period of thirty (30) days after they are filed. At the conclusion of thirty (30) days following the filing of such a transcript, the sealing order shall be lifted automatically and the transcript shall be available immediately to the press and public, unless by further order of the court the sealing order is extended as to that particular transcript.

2. During the first thirty (30) days after each transcript is filed and docketed, any party may move the court to extend the sealing order as to such transcript or otherwise seal or redact portions of the transcript before it is made public.

3. At the conclusion of the case, all such transcripts shall be unsealed, and full, complete, and unredacted copies of the transcripts shall be available for public and press access.

4. A copy of this Order shall be made available to the press and public through the court's webpage link to this case.

5. The Clerk is DIRECTED to forward a copy of the foregoing to all counsel of record.

DONE this the 25th day of September, 2003.

T. MICHAEL PUTNAM
CHIEF MAGISTRATE JUDGE